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No. 07-981

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SUPREME COURT, U.S.

In The Supreme Court of the United States

PAUL J. MEYERS,

Petitioner,

v.

JOHN R. PARTRIDGE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

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STATEMENT OF CASE

I. Partridge's Involvement in the Professional Review Action[1]

Petitioner, Paul J. Meyers, M.D. ("Meyers"), is an obstetrician-gynecologist, and from 1991 to 2000, he was employed by Riverside Regional Medical Center ("Riverside") in Newport News, Virginia. (First Am. Mot. for J. at ¶ 1.) On March 1, 2000, Riverside terminated Meyers' employment contract

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[1] Pursuant to Rule 24 of the Rules of the Supreme Court of the United States, Partridge has included his own Statement of the Case because he is dissatisfied with the presentation by Meyers in his Petition for Writ of Certiorari ("Petition"). Pursuant to Rule 14, Partridge has included additional facts material to consideration of the questions presented.

and suspended all of his clinical privileges. (Mot. for J. at ¶ 12.)[2]

From 1997 to 2000, Meyers also had clinical privileges at Mary Immaculate Hospital ("MIH") in Newport News. (First Am. Mot. for J. at ¶ 3.) On March 30, 2000, Meyers attended a meeting with agents of MIH during which Meyers explained that his suspension at Riverside was related to patient complications, and Meyers described in detail the complications. (Mot. for J. at ¶ 17.) On April 17, 2000, MIH suspended Meyers' privileges at MIH. (Id. at ¶ 8(i).)

On June 14, 2000, the Medical Executive Committee of MIH voted to continue Meyers' suspension. (Id. at ¶ 8(ii).) On June 19, 2000, the Board of Trustees of MIH approved Meyers' continued suspension by the Medical Executive

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[2] On July 10, 2006, Meyers obtained leave of court to file a First Amended Motion for Judgment. In Plaintiff's Motion to Amend Pleadings, Meyers states that he deleted some of the allegations in the Motion for Judgment which "are not relevant to Meyers' claim for defamation *per se*" and that deleting those allegations "will facilitate a trial on of [sic] the issues." (Pl.'s Mot. to Amend Pleadings at 1.) In this Brief in Opposition to the Petition ("Brief in Opposition"), John R. Partridge has cited to both the original Motion for Judgment and the First Amended Motion for Judgment filed by Meyers, as both contain allegations relevant to Meyers' Petition.

Committee "until further information was available." (Id. at ¶ 8(iii).) Meyers claims that the "sole basis" upon which Meyers' clinical privileges originally were suspended was the fact that Riverside had terminated Meyers' employment contract on March 1, 2000. (Id. at ¶ 12.)

After Meyers' continued suspension was approved, MIH obtained from Riverside the files of thirty-one (31) of Meyers' patients at Riverside. (Id. at ¶¶ 7-8.) Those patient files showed, among other things, that during less than a four (4) month period from November 17, 1999 to March 1, 2000, Meyers perforated a patient's bowel during an operation on five different occasions. (Id. at ¶ 19.)

After obtaining the patient files from Riverside, MIH sent the files to Respondent, John R. Partridge, M.D. ("Partridge"), and requested on September 1, 2000 that Partridge review the files. (First Am. Mot. for J. at ¶ 6.) MIH directed Partridge to focus his review on: (a) whether there were appropriate indications from the surgical procedure performed; (b) whether patient selection for open versus laparoscopic approach was appropriate; and (c) whether the complications that occurred were expected, recognized appropriately, and managed appropriately. (Id. at ¶ 7.)

Partridge is an obstetrician-gynecologist who conducts business in Richmond, Virginia.[3] (Id. at ¶ 4.) At the time he was retained by MIH in September 2000 to review Meyers' files, Partridge did not know Meyers and did not have privileges to practice at either MIH or Riverside. (Reply Mem. in Supp. of Def.'s Mot. for Summ. J. at 2.) After completing his review of the patient files, Partridge rendered a report to MIH on October 9, 2000. (Id. at ¶ 12.) Through his report, Partridge recommended that Meyers' privileges at MIH be reinstated under certain conditions. (Br. of Appellee in Opp'n to Pet. for Appeal at 2.)

As a part of the professional review of Meyers, Partridge's October 9, 2000 report was provided, among others, to the members of the Credentials and Medical Executive Committees at MIH, the Board of Trustees at MIH, the Chief Administrator at MIH, and the Chief Executive Officer and the Vice President of Medical Affairs of Bon Secours Hampton Roads. (Id. at ¶ 32.) After receiving Partridge's report, MIH continued its professional

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[3] Meyers attached a page from Partridge's interrogatory answers to his Petition to support his allegation in the Statement of the Case that Partridge earns "significant income as an expert witness." (Pet. at 5-6.) The amount of money which Partridge has earned from serving as an expert witness is not a fact material to consideration of the questions presented in Meyers' Petition and thus should not be considered in connection with the Petition pursuant to Rule 14 of the Rules of the Supreme Court of the United States.

review process, and on March 22, 2001, the fair hearing panel selected by MIH conducted a hearing on Meyers. (Mot. for J. at ¶ 20(ii).) The fair hearing panel recommended Meyers' unconditional reinstatement, but that recommendation was rejected by the Board of Trustees of MIH, allegedly in reliance solely on Partridge's report.[4] (Id. at ¶¶ 21-22.) Neither the Medical Executive Committee nor the Board of Trustees of MIH chose to follow Partridge's recommendation, made in connection with his October 2000 report, that Meyers should be reinstated under certain conditions. (Id.)

After providing his report to MIH, Partridge received a letter from counsel for Meyers through which Meyers took issue with various aspects of Partridge's October 9, 2000 report and demanded that Partridge retract his allegedly false statements. (First Am. Mot. for J. at ¶¶ 34-39, 53, 62, 73, 90.) In the 2001 letter sent to Partridge, counsel for Meyers alleged that "MIH is determined to try and ruin this young physician [Meyers], and behaving like a typical American corporation inflicting institutional violence on an individual because it thinks it can get away with it. I doubt that it will even in the Fourth Circuit." (Mem. of Law Opposing Def.'s Demurrer, Ex. A, filed 12/3/01.) In the 2001 letter to Partridge, counsel for Meyers also stated that he was giving Partridge an opportunity to make "whatever

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[4] Meyers alleges that the Medical Executive Committee and the Board of Trustees of MIH rejected the fair hearing panel's recommendation "in reliance solely on Partridge's report." (Mot. for J. at ¶¶ 21-22.)

modifications [he] deem[ed] fit to make, if any, in light of the information" provided in the letter from counsel for Meyers. (Id.)

After Partridge refused to change his October 9, 2000 report (First Am. Mot. for J. at ¶¶ 39, 42), Meyers filed this lawsuit against Partridge on September 5, 2001 in the Circuit Court for the City of Newport News ("Circuit Court"), alleging four counts of defamation *per se* based on the report prepared by Partridge for MIH as part of the professional review activities and seeking $500,000 in compensatory damages and $500,000 in punitive damages.[5] (Mot. for J. at 17.)

On July 10, 2006, the Circuit Court granted Meyers leave of court to amend his lawsuit, and through the First Amended Motion for Judgment, Meyers alleged six (6) counts of defamation *per se* against Partridge and sought $650,000 in compensatory damages and $350,000 in punitive damages. (First Am. Mot. for J. at 14.) Through a letter opinion dated August 2, 2006, the Circuit

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[5] As part of his Statement of the Case, Meyers detailed the Demurrer filed by Partridge to the original Motion for Judgment and the outcome reached by the Circuit Court on the Demurrer in 2002. The Circuit Court's ruling on the Demurrer is not a fact material to consideration of the questions presented in Meyers' Petition and thus should not be considered in connection with Meyers' Petition pursuant to Rule 14 of the Rules of the Supreme Court of the United States.

Court granted Partridge's motion for summary judgment based upon the immunity from damages provided to Partridge pursuant to the Health Care Quality Improvement Act ("HCQIA") for his participation in the professional review action. (Pet., App. E.)

Since September 2001, Meyers has filed three lawsuits against Partridge in the Circuit Court, none of which resulted in a verdict for Meyers.[6] In addition, Partridge has responded to three unsuccessful petitions for appeal filed by Meyers to the Supreme Court of Virginia.[7] All of the claims which Meyers has asserted against Partridge relate

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[6] In addition to this lawsuit filed against Partridge on September 5, 2001, Meyers filed a second lawsuit against Partridge on February 5, 2003, which also named Bon Secours Hampton Roads as a defendant (Case No. CL0336286H-02). That second lawsuit was dismissed on August 19, 2004. On February 17, 2005, Meyers filed a third lawsuit against Partridge, which also named Bon Secours Hampton Roads as a defendant (Case No. CL0539045H-02). That third lawsuit still is pending in the Circuit Court, even though it has not been served on the defendants.

[7] In the second lawsuit filed by Meyers against Partridge, Meyers filed petitions for appeal on April 7, 2004 and October 5, 2004, both of which were refused by the Supreme Court of Virginia (Case Nos. 040826, 042227). In this case, Meyers filed a petition for appeal on April 19, 2007 which was refused by the Supreme Court of Virginia on October 26, 2007 (Case No. 070775).

to the October 9, 2000 report which Partridge prepared for MIH after MIH retained Partridge to participate in the professional review action following Meyers' suspension from MIH.

Partridge is one of several defendants against which Meyers has filed suit following his suspension from Riverside and MIH in 2000. In addition to the lawsuits filed against Partridge, Meyers also filed three other lawsuits relating to his suspensions, none of which resulted in a verdict in favor of Meyers.[8] In the case filed by Meyers against Riverside (Case No. 0232139H-02), the Circuit Court dismissed the lawsuit on demurrer, and Meyers appealed that ruling to the Supreme Court of Virginia. After the Supreme Court of Virginia refused Meyers' petition, Meyers appealed the decision to the Supreme Court of the United States. That related appeal to this Court was docketed on January 24, 2008 as No. 07-969, with the Brief in Opposition due by Riverside on February 25, 2007.

II. October 9, 2000 Report

Meyers alleges that Partridge rendered two reports to MIH, one on September 25, 2000 and one

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[8] Two of the three lawsuits were filed on October 23, 2001 against Riverside, Bon Secours, and several individuals (Case Nos. CL0131394H-02, CL0131395H-02). The last of the three lawsuits was filed on May 14, 2002 against two individuals regarding the suspension of Meyers' privileges (Case No. CL0232139H-02).

on October 9, 2000. (First Am. Mot. for J. at ¶¶ 10, 12). In his lawsuit and in his Petition, Meyers claims that Partridge "substantially changed" his September 25, 2000 report, that Partridge "deleted all the favorable statements" about Meyers' patient care in his September report from the report which Partridge provided on October 9, 2000, that Partridge materially "altered" the substance of his criticism of several cases, and that Partridge added fabricated criticisms to his October 9, 2000 report. (Id. at ¶¶ 11-13; Pet. at 6.) Partridge has disputed, and continues to dispute, Meyers' allegations regarding the report provided by Partridge. (Grounds of Defense at ¶¶ 9, 12; Answer to First Am. Mot. for J. at ¶¶ 11-13.) Nevertheless, Partridge does not address these factual misstatements in this Brief in Opposition because such misstatements by Meyers do not bear on the issues which would properly be before the Court if certiorari was granted.

In support of his motion for summary judgment, Partridge set forth a short list of undisputed facts, none of which dealt with whether his October 9, 2000 report contained allegedly false information, and Meyers did not contest any of the undisputed facts upon which Partridge relied. (Reply Mem. in Supp. of Def.'s Mot. for Summ. J. at 2, filed 7/7/06.) Through its ruling on Partridge's summary judgment motion, the Circuit Court did not make any factual findings regarding Meyers' allegation that the October 9, 2000 report by Partridge contains false information. In fact, the Circuit Court specifically provided that there was "no reason to reach the plaintiff's issue of whether or

not the information provided by Dr. Partridge was false and that he knew it to be false." (Pet., App. E at 37a.) Accordingly, even if this Court were to grant Meyers' Petition and review the Circuit Court's summary judgment ruling, the issue of whether the October 9, 2000 report allegedly contained false information would not be properly before the Court.

ARGUMENT

I. Partridge Is Entitled to Immunity under HCQIA.

A. Based on his Role in the Professional Review Action, Partridge Is Not Liable for Damages under 42 U.S.C. § 11111(a)(1).

Pursuant to 42 U.S.C. § 11111(a)(1), any person "under a contract or other formal agreement with the [professional review] body" and any person "who participates with or assists the [professional review] body with respect to the action" shall not be liable in damages with respect to the action "if a professional review action of a professional review body meets all the standards specified in section 11112(a)." Pursuant to § 11112(a), a professional review action must be taken

> (1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

The record for this case shows (and Meyers has never disputed)[9] that the professional review body at MIH met all the standards specified in §

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[9] At the July 10, 2006 hearing on Partridge's summary judgment motion, Meyers admitted that the standard under § 11112(a) had been met. Specifically, counsel for Meyers stated as follows: "so the record is clear, I'm conceding that it is – we are collaterally estopped from arguing that MIH's actions failed to meet the statutory standard set forth in 11112(a). That's all we are conceding. We're not conceding anything else." (Tr. for 7/10/06 hr'g at 76, filed 7/18/06.) In addition, counsel for Meyers stated: "The argument is being made as to the hospital has met statutory standards and they have, and I concede that as a matter of law...." (Id. at 87.)

11112(a). In the letter opinion dated August 2, 2006, the Circuit Court held:

> ....Whether based upon application of legal principle or a belated acceptance of reality, the plaintiff agrees the actions of Mary Immaculate Hospital (MIH) in the facts and circumstances of this case, have been determined to have met all the standards specified in section 412(a) (42 U.S.C. section 11112(a) so as to provide Mary Immaculate Hospital with immunity.... [T]he plaintiff [has] conceded the Act applies in this case and that the plaintiff failed to rebut the presumption contained in the Act that the actions of Mary Immaculate Hospital were a professional review action presumed to have meet [sic] all of the standards contained in 42 U.S.C. section 11112(a) of the Act.

(Pet., App. E at 25a-26a).

Likewise, Meyers has not disputed that Partridge was "retained" by MIH to review medical records as part of the professional review action. In its letter opinion dated August 2, 2006, the Circuit Court addressed this issue as follows:

> Since the plaintiff in Footnote 1 of its "Brief in Opposition to Defendant's Motion for Summary Judgment" also alleges and concedes and agrees that

> the defendant in this case Dr. Partridge was "retained" by Mary Immaculate Hospital to review the medical records which Riverside had used in their suspension of the plaintiff...the only question remaining is whether Dr. Partridge qualifies for immunity under section 42 U.S.C. section 11111(a)(1) or subsection (a)(2) of the Act....

(Id. at 26a.)[10] The Circuit Court described Partridge as a total stranger to the peer review process who was retained by MIH to conduct an independent review of medical records from Riverside. (Id. at 37a.) The Circuit Court concluded that Partridge was entitled to immunity under § 11111(a)(1)(C) or (D) or both because he was under a contract with MIH and because he participated or assisted the professional review body. (Id.) The Circuit Court properly concluded that "there is simply no other characterization of his function in this process." (Id.) In its letter opinion, the Circuit Court also stated that it did "not consider this to be a close question" and held that if "there is any person who should be extended immunity under this act, it would be a professional hired to conduct an independent review who had no contact with either the body conducting the review or the doctor in question or any of the patients." (Id. at 27a, 33a-34a.)

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[10] Plaintiff did not appeal this finding of the Circuit Court. Instead, Meyers agreed to this finding as part of summary judgment, and this finding is not in dispute on appeal.

Based upon the independent review of medical records which Partridge completed after he was retained by MIH as part of professional review activities which met the requirements of § 11112(a), Partridge is immune from suit for monetary damages by Meyers under § 11111(a)(1)(C) and (D).

B. The Circuit Court Properly Construed 42 U.S.C. § 11111(a)(1).

In his Petition, Meyers admits that § 11111(a) "obviously provides two independent bases of immunity," but Meyers argues that the "bases of immunity apply to different activities and not the same activity." (Pet. at 14.) Meyers claims that providing information to a professional review body is treated by HCQIA as a "different type of activity from participating with or assisting the body with a professional review action." (Id. at 12.) In support of his argument, Meyers cites to the statute itself. (Id. at 12, 14.)

A review of the plain language of § 11111(a) shows that HCQIA provides two different levels of immunity, but it does not support the two different levels for which Meyers argues in his Petition. Instead, the plain language of the statute outlines the following two levels of immunity: (1) Subsection (a)(1) provides immunity to the list of entities and persons in that subsection if the professional review action meets all of the requirements of § 11112(a); and (2) Subsection (a)(2) provides immunity to persons who provide information to the professional review body, even if the professional review action does not meet the standard of § 11112(a), unless the

information is false and the person providing it knew that such information was false. What is different about the two levels of immunity is that a person cannot be protected under (a)(1) unless the professional review action met the standards set forth in § 11112(a) whereas a person can be protected under (a)(2) even if the professional review action did not meet the standards set forth in § 11112(a) as long as he does not provide information which he knows to be false.

In addition, there is no support in HCQIA for Meyers' strained argument that "[u]nder the Act Congress enacted, a professional review body's immunity does not immunize a defendant who has knowingly made false statements to the body." (Pet. at 26.) To the extent that Congress had intended to exclude from § 11111(a)(1) immunity any persons who provided information which they knew to be false, Congress would have included that restriction in (a)(1), as it did in (a)(2). Instead, the only restrictions which Congress chose to put in § 11111(a)(1) for obtaining immunity are that the professional review action must meet the standards set forth in § 11112(a) and the entity or person seeking immunity must fall into one of the four categories listed in § 11111(a)(1)(A)-(D). Therefore, the Circuit Court properly construed § 11111(a)(1)

when it held that Partridge was entitled to immunity from damages under HCQIA.[11]

C. The Circuit Court's Construction of § 11111(a)(1) Does Not Lead to an Absurd Result.

In the Petition, Meyers claims that the Circuit Court's construction of § 11111(a) leads to "an absurd result" which "Congress could not possibly have intended" because he claims that the Circuit Court has constructed federal law in such a manner that HCQIA "immunizes person who knowingly make false statements to a hospital about a physician's case and management." (Pet. at 21-22.)

Contrary to Meyers' argument, the Circuit Court did not make any findings regarding a person who knowingly provides false information to a professional review body. The Circuit Court concluded that whether § 11111(a)(2) would apply to Partridge was "moot as the court has determined that Dr. Partridge in his status as a 'retained' independent expert hired to review medical records

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[11] At the hearing on Partridge's motion for summary judgment, Meyers admitted that Partridge was immune from the opinion which he gave on what should be done with Meyers. (Tr. for 7/10/06 hr'g at 69-70, filed 7/18/06.) Meyers also admitted that Partridge's recommendations are not information under § 11111(a)(2). Furthermore, Meyers admitted that Partridge did not have first hand knowledge but instead only had opinions which were set forth in the report which he submitted. (Id. at 78.)

by the 'body' has immunity under (a)(1)." (Id., App. E at 34a). In addition, the Circuit Court concluded that there was "no reason to reach the plaintiff's issue of whether or not the information provided by Dr. Partridge was false and that he knew it to be false." (Id. at 37a.) In its letter opinion, the Circuit Court outlined the question presented by Partridge's Motion for Summary Judgment as "whether the defendant Dr. Partridge is entitled to immunity under section (a)(1) or (a)(2) of the section either or both." (Id., at 26a, 27a.)

The Circuit Court's construction of § 11111(a)(1) does not lead to an absurd result. Instead, the Circuit Court applied the plain language of (a)(1) to the undisputed facts presented regarding Partridge's participation in the professional review action and concluded that Partridge was the exact type of person who is

entitled to immunity under § 11111(a)(1).[12] (Id. at 27a, 33a-34a.). The Circuit Court summarized its findings as follows:

> There can be no participant in this action more deserving of the immunity provided by the Health Care Quality Immunity [sic] Act than Dr. John R. Partridge, M.D. who was a total stranger to this process and was retained by the professional review body to conduct an independent review of medical records utilized by Riverside Hospital in the initial suspension of Dr.

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[12] Meyers' own explanation in the Petition regarding a reviewer further shows that Partridge is entitled to immunity under § 11111(a)(1). In the Petition, Meyers argues that a "reviewer who renders purely opinions is not 'providing information' and is not liable for defamation. The reviewer may or may not assist the body with its actions by rendering opinions, discussing and explaining them, making recommendations, and so on. If he does, the reviewer is immune for assisting the body if the body is immune but not if he or she assists the body with actions that do not meet the standards of 42 U.S.C. § 11112(a)." (Pet. at 15.) MIH provided Partridge with patient files and asked Partridge to review the files and provide his opinions on three specific topics. (First Am. Mot. for J. at ¶¶ 6-7.) Accordingly, Partridge is entitled to immunity under § 11111(a)(1) for reviewing the files and providing his opinions to MIH as part of a professional review action which met the requirements of § 11112(a).

> Meyers in the attempt by Mary Immaculate Hospital to obtain all of the information and perform a fair and adequate review of their decision to suspend Dr. Meyers to improve the quality of healthcare.

(Id. at 37a.) For the reasons stated by the Circuit Court above, there is nothing absurd about Partridge being protected pursuant to § 11111(a)(1) for his participation in MIH's professional review action.

Since providing his report to MIH on October 9, 2000, Partridge has defended against multiple defamation claims asserted by Meyers based upon the content of Partridge's report. While his involvement in the professional review action at MIH was brief, Partridge has spent over six (6) years in litigation with Meyers since he provided his report. Throughout the litigation, Meyers has continued to attempt to delve into factual allegations, claiming that Partridge's report contains false information. The Circuit Court correctly held that there is no reason to reach these factual issues because Partridge is entitled to immunity under HCQIA. The history of this case reinforces the reasons that HCQIA was drafted with the protections set forth in § 11111(a)(1).[13] A person who participates in a professional review action which

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[13] Without such immunity, doctors like Partridge will not be encouraged to participate in the professional review process for fear of being sued by suspended doctors like Meyers.

meets the standards of § 11112(a) is entitled to immunity under HCQIA and should not be required to defend every sentence of every report that he prepared after being retained to participate in a professional review action.[14]

Chapter 117 of Title 42 which contains HCQIA is titled "Encouraging Good Faith Professional Review Activities," and in § 11101, Congress sets forth findings relevant to the enactment of HCQIA. Through those findings, Congress indicated that the "increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems" which "can be remedied through effective professional peer review." 42 U.S.C. § 11101(1), (3). In addition, Congress acknowledged that the "threat of private money damage liability...unreasonably discourages physicians from participating in effective professional peer review," and Congress concluded that there is "an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review." Id. at § 11101(4), (5). Through HCQIA, the incentive and protection which Congress provides to doctors like Partridge who engage in a professional review action is the immunity protection set forth in § 11111(a). Through its decision, the Circuit Court

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[14] At the hearing on Partridge's motion for summary judgment, the Circuit Court stated that § 11111(a)(1) immunity "is there for a reason, so there simply won't be a lawsuit." (Tr. for 7/10/06 hr'g at 95, filed 7/18/06.)

has done nothing more than apply the protection which Congress enacted through HCQIA to Partridge based on his participation in MIH's professional review action after Meyers' privileges were suspended.

II. Partridge Is Entitled to Recover his Attorneys' Fees and Costs under HCQIA.

A. Meyers' First Impression Argument Was Not Raised in the Circuit Court.

Meyers frames the second Question Presented as whether HCQIA authorizes attorneys' fees where Meyers challenges Partridge's immunity under § 11111(a) on a case of first impression and Partridge prevails solely on immunity. (Pet. at i.) In Section II of the Reasons for Granting Petition, Meyers claims that the Circuit Court's interpretation of § 11113 is inconsistent with the Court's precedent because the Court has held that an award of attorneys' fees is not appropriate where the defendant prevails on a case of first impression requiring judicial resolution. (Id. at 26-27.)

Meyers' argument outlined in the second Question Presented and in Section II of the Reasons for Granting Petition is not an argument which Meyers raised in Plaintiff's Brief Opposing Motion for Attorney's Fees ("Plaintiff's Brief Opposing") filed with the Circuit Court. Instead, in Plaintiff's Brief Opposing, Meyers focused on rearguing the reasons that he claimed Partridge was not entitled to immunity under § 11111(a)(1) and the reasons that

Meyers' conduct of the litigation was not frivolous, unreasonable, without foundation or in bad faith. It was not until Meyers filed his Petition for Appeal to the Supreme Court of Virginia that he chose to raise his first impression argument in connection with the attorneys' fees and costs issues. Because Meyers did not raise his first impression argument in the Circuit Court, he should not be permitted to raise this issue on appeal to this Court.

Furthermore, even if Meyers had raised this issue before the Circuit Court, his argument still fails because similar immunity issues were decided by the Circuit Court in other cases before the case against Partridge was dismissed. In his Memorandum in Support of Motion for Summary Judgment, Partridge cited the following two cases which were decided by the Circuit Court on similar issues before Partridge's Motion for Summary Judgment was heard, one of which is a decision in another case filed by Meyers:

> In two similar cases recently decided by the Circuit Court for the City of Newport News, the Court found that individuals participating with or assisting the professional review body were immune from damages pursuant to § 11111(a)(1). First, Judge H. Vincent Conway issued a Final Order in Fuste v. Riverside Healthcare Association, Inc., Law No. 29743-VC, on May 12, 2006, granting defendants' Motion for Summary Judgment based

on the immunity provided under the Act....

In the Final Order, the Court in Fuste held that the Act "provides two separate and independent forms of immunity in the medical peer review process, one pursuant to 42 U.S.C. § 11111(a)(1) and a second, pursuant to 42 U.S.C. § 11111(a)(2)." Ex. B at 1. Pursuant to § 11111(a)(1), immunity applies to "any individual who participates with or assists in a medical peer review process if the standards set forth in 42 U.S.C.§ 11112(a) are met." Id. at 2. The Court held that when the requirements of § 11112 are not met, an individual "providing information to medical review bodies is still afforded immunity from damages, unless the information provided by such individual is false and the individual providing the information knew that it was false." Id. All of the claims against defendants were dismissed in Fuste based upon the two levels of immunity provided under the Act to the defendants.

Second, Retired Judge John E. Clarkson, sitting by designation, issued a letter opinion in Meyers v. Riverside Hospital, Inc., Law No. 31394-EH, another companion case to plaintiff's case against Dr. Partridge in which plaintiff sued Riverside when his privileges were suspended and his

> employment terminated (see numerous references to Riverside in the Motion for Judgment against Dr. Partridge), on June 12, 2006, granting defendants' Demurrer to the Plaintiff's Third Amended Motion for Judgment, with no further leave to amend and dismissing the action with prejudice.... In the letter opinion, the Court held that the process and standards of review of Riverside were reasonable, and therefore, those participating in or assisting with the peer review activity are immune from damages. Ex. C at 1. The Court concluded that plaintiff was not able to rebut defendants' presumption of immunity by a preponderance of the evidence. Id. at 2.

(Mem. in Supp. of Mot. for Summ. J. at 10-11.)[15] In light of the decisions cited above, Meyers' challenge

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[15] Other courts outside Virginia also have concluded that an individual who participates in or assists in the professional review process has two independent opportunities to qualify for immunity under HCQIA. See, e.g., Jenkins v. Methodist Hosps. of Dallas, Inc., No. 3:02CV1823-M, 2004 WL 3393380 (N.D. Tex. Aug. 14, 2004) (focusing on the two different immunities provided by the Act), aff'd, 478 F.3d 255 (5th Cir.), cert. denied, 128 S. Ct. 181 (2007); Singh v. Blue Cross & Blue Shield of Mass., Inc., 182 F. Supp. 2d 164 (D. Mass. 2001), aff'd, 308 F.3d 25 (1st Cir. 2002) (recognizing the dual basis for immunity

of Partridge's immunity under § 11111(a) was not a case of first impression; in fact, it was the second case in which litigation filed by Meyers was dismissed based upon HCQIA immunity.[16]

B. Partridge Has Shown the Elements Required to Recover his Attorneys' Fees and Costs.

In addition to providing immunity to participants in professional review actions, HCQIA

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under HCQIA for a person who assists the professional review body by providing information).

[16] The cases which Meyers cites in his Petition on the first impression issue hold that an award of attorneys' fees under § 11113 should be reviewed under an abuse of discretion standard. Sugarbaker v. SSM Health Care d/b/a St. Marys Health Ctr., 187 F.3d 853, 857 (8th Cir. 1999) ("We agree and hold that the abuse of discretion standard is the appropriate standard of review."); Muzquiz v. W.A. Foote Mem'l Hosp., 70 F.3d 422, 432 (6th Cir. 1995) (same). The Court held that a person can be assessed his opponent's attorneys fees if "a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 422 (1978). The Circuit Court applied this standard in determining that Partridge was entitled to his attorneys' fees and costs, and accordingly, the Circuit Court did not abuse its discretion in making the award set forth in its January 11, 2007 letter opinion.

contains a fee shifting provision designed to discourage physicians disciplined through a professional review action from bringing frivolous lawsuits. Defendants must show the following in order to recover their attorneys fees and costs under HCQIA:

> (1) Defendant is among the persons covered by § 11111(a);
> (2) The standards set forth in § 11112(a) were met;
> (3) Defendant substantially prevailed; and
> (4) Plaintiff's claims or conduct during the litigation were frivolous, unreasonable, without foundation or in bad faith.

42 U.S.C. § 11113. Partridge is entitled to recover his attorneys' fees and costs because he has met the requirements set forth in § 11113.

First, Partridge is among the persons covered by § 11111(a). For the reasons set forth above in Section IA, Partridge is entitled to immunity under § 11111(a)(1) as he was under a contract with MIH and participated or assisted the professional review body by reviewing the files of Meyers' patients and rendering a report to MIH regarding his review of such files. The Circuit Court explained the immunity for damages to which Partridge is entitled under (a)(1) as follows:

> Dr. Partridge was "retained" by Mary Immaculate Hospital to review

[the medical records of Meyers]. He is clearly a person "under a contract or formal agreement with the Body;" and he is without doubt "a person who participate[s] (d) with or assisted(ed) the body with respect to the action." If there is any person who should be extended immunity under this act, it would be a professional hired to conduct an independent review who had no contact with either the body conducting the independent review or the doctor in question or any of the patients. To not extend such immunity to facilitate the independent review would mean no physician would participate in such a manner and the "quality of healthcare" would not be "furthered".

In this case, Dr. Partridge is a physician practicing in Richmond, some seventy (70) miles away from the Newport News area who was hired to conduct an independent review of this action and to not extend immunity to an independent professional "retained" by the body to participate in or assist in the peer review action would be to mean that there would be no "independent review" of any of these actions across the country and clearly such "independent review" would also benefit the healthcare professional who is subject of the peer review action.

> ....[T]he court has determined that Dr. Partridge in his status as a "retained" independent expert hired to review medical records by the "body" has immunity under (a)(1) of 42 U.S.C. section 11111.

(Pet., App. E at 33a-34a.)

Second, the standards set forth in § 11112(a) were met. In a separate case filed by Meyers against MIH, the Circuit Court determined that MIH's professional review action met the requirements of § 11112(a), and Meyers has not contested that finding (nor could he) as part of this case against Partridge. The Circuit Court addressed the § 11112(a) issue as follows:

> Whether based upon application of legal principle or a belated acceptance of reality, the plaintiff agrees that the actions of Mary Immaculate Hospital (MIH) in the facts and the circumstances of this case, have been determined to have met "all the standards specified in section 412 (a)(42 U.S.C. section 11112(a)) so as to provide Mary Immaculate Hospital with immunity as determined by this judge's immediate predecessor, the Honorable Edward L. Hubbard, in the matter of Paul J. Meyers, M.D. v. Mary Immaculate Hospital, Inc., et al and Paul J. Meyers, M.D. v. Allen B. Nichols, M.D. and Dennis A. Holbrook,

> Law No. 31395-EH. (TR. p. 57, 7/10/06) Said order having been entered by the Circuit Court for the City of Newport News on the 1st day of December, 2003 with the plaintiff's petition for appeal to the Supreme Court of Virginia being denied by order of the Supreme Court dated June 16, 2004. (TR. p. 76, 7/10/06).

(Id. at 25a-26a.)

Third, Partridge substantially prevailed in the action filed against him by Meyers. Through an Order entered on September 15, 2006, the Circuit Court ruled as follows:

> After a hearing, *ore tenus*, with consideration of all matters raised and argued at said hearing to include the application of a prior decision of this court, Meyers v. Mary Immaculate Hospital, Case No. C101-31395-H-02 of December 1, 2003, incorporating a Letter Opinion dated September 5, 2003, (Cert. denied Virginia Supreme Court) as judicially admitted during said hearing; and a review of all pleadings filed herein to include pleadings and memorandum and briefs of counsel filed prior to said hearing and subsequently, prior to preparation of this Letter Opinion dated August 2, 2006, which is incorporated herein as if fully restated; the Motion for Summary

> Judgment filed by defendant against plaintiff is granted.

(Order entered 9/15/06 at 2.)

Fourth, the Circuit Court determined that Meyers' claims or conduct after it was determined that MIH was eligible for immunity under HCQIA were sufficient to meet the standard set forth in § 11113. Through its letter opinion dated January 11, 2007, the Circuit Court concluded as follows:

> Once Mary Immaculate Hospital established it's [sic] eligibility for immunity under the Healthcare Quality Improvement Act and plaintiff's petition was denied by the Supreme Court of Virginia; whether or not the initial filing of this suit against Dr. Partridge was justifiable, the continuation of that claim against Dr. Partridge was unreasonable and without foundation. The defendant shall be awarded his costs and attorney's fees expended from June 16, 2004 through December 21, 2006 as follows:
>
> Attorneys' Fee.....$87,971.35
> Costs.....8,255.51

(Pet., App. C at 16a.)[17] For the reasons stated by the Circuit Court, the fourth element under § 11113 also has been met.

Because he has shown the required elements under § 11113, Partridge is entitled to recover the attorneys' fees and costs awarded to him by the Circuit Court.

III. Meyers Has Failed to Set Forth Any Compelling Reasons for Granting his Petition.

Meyers' Petition should be denied because Meyers has failed to set forth any compelling reasons for granting certiorari. Pursuant to Rule 14(h) of the Rules of the Supreme Court of the United States, Meyers' Petition "shall contain . . . [a] direct and concise argument amplifying the reasons relied on for allowance of the writ." Following the above quoted sentence, Rule 14(h) cross references Rule 10 which indicates that a petition for a writ of certiorari only will be granted "for compelling reasons" and thereafter sets forth a non-exhaustive list of reasons the Court considers compelling. Rule 10(b)-(c) sets forth the following four justifications for granting a petition regarding appeals from state courts of last resort:

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[17] Partridge requested additional attorneys' fees prior to June 16, 2004 and after December 21, 2006 which the Circuit Court denied. Partridge did not appeal that denial.

(1) "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort";

(2) "a state court of last resort has decided an important federal question in a way that conflicts with the decision...of a United States court of appeals";

(3) "a state court...has decided an important federal question in a way that conflicts with relevant decisions of this Court"; and

(4) "a state court...has decided an important question of federal law that has not been, but should be, settled by this Court."

Here, Meyers has failed to suggest any conflict between the interpretation of HCQIA by the Virginia courts and any decision of another state court of last resort, federal court of appeals, or decision of this Court. Meyers also fails to cite a single published federal district court decision which conflicts with the interpretation of HCQIA reached by the Circuit Court. Furthermore, Meyers fails to cite any case from any state or federal court, published or unpublished, which interpreted HCQIA in the manner sought by Meyers through his Petition.

Although a conflict between courts is not required to grant a petition for writ of certiorari, the practical realities of this Court's capacity make

hearing a case in which there is no conflict between courts an extraordinary exception. Yee v. City of Escondido, 503 U.S. 519, 536 (1992) (indicating that the Court has the capacity "to decide only a small fraction" of the petitions it receives, that the Court must therefore "grant certiorari only in those cases that will enable [the Court] to resolve particularly important questions," and that the lack of a conflict in the lower courts weighs against granting certiorari); see also Kansas v. Marsh, 548 U.S. 163, 126 S. Ct. 2516, 2530 (2006) (Scalia, J.) (concurring) ("Our principal responsibility under current practice, however, and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions, see Art. III, § 2, cls. 1 and 2, is to ensure the integrity ***and uniformity*** of federal law.") (footnote omitted) (emphasis added); Hubbard v. United States, 514 U.S. 695, 720 (1995) (Rehnquist, C.J.) (dissenting) ("We receive nearly 7,000 petitions for certiorari every Term...[and] [a] high degree of selectivity is thereby enjoined upon us in exercising our certiorari jurisdiction....[O]ur Rule 10 embodies the standards by which we decide to grant review...and [t]he negative implication of [Rule 10's requirement of a conflict between courts] borne out time and again in our decisions to grant and deny certiorari, is that ordinarily a court of appeals decision interpreting one of our precedents—even one deemed to be arguably inconsistent with it—will not be reviewed unless it conflicts with a decision of another court of appeals."). Because Meyers is asking the Court to step in and recast an immunity provision about which no federal or state courts disagree as to the proper interpretation, his Petition should be denied.

Because no conflict in interpretation of § 11111(a)(1) exists between the different courts, Meyers attempts to argue that his Petition should be granted because the Virginia courts decided an "important" question of federal law that should be settled by this Court. (Pet. at 29.) In support of his Petition, Meyers attempts to argue that the Circuit Court created new immunities under HCQIA which will protect unwarranted peer review which will expose the public to harm. (Id. at 29-33.) Instead of showing that the Petition addresses an important question of federal law decided by the Virginia courts, Section III of the Petition reveals the reality of Meyers' appeals: Meyers is dissatisfied with the broad immunity provided under HCQIA, and he ultimately is seeking reformation, rather than reinterpretation, of what he argues has been an unsuccessful statute. Meyers has failed to establish a heightened importance such that the Court "should...settle[]" the questions raised in the Petition. In fact, there is nothing to "settle" as the Circuit Court interpreted and applied the plain language of HCQIA, finding that Partridge was immune from damages in the lawsuit filed by Meyers based upon Partridge's participation in the professional review action.

In Part III of the Petition, Meyers argues that "[u]nwarranted peer review is far more common than generally recognized" and implies that the Circuit Court's commonsense interpretation of the plain language of HCQIA will improperly protect future unwarranted peer review. (Pet. at 30-31.) Meyers then cites several articles which discuss the proposition that peer review as a practice, even good

faith peer review, "has been ineffective at protecting patients." (Id. at 31.) Such articles are wholly unrelated to the scope of immunity granted by HCQIA and instead argue that peer review as an institution is ineffective. Even if these articles cited by Meyers are correct, the solution to this "unwarranted peer review" issue should come from the medical profession changing its procedure for policing doctor errors (which is the primary theme of several articles cited in the Petition) or Congress could "correct any deficiencies in the legislation," as acknowledged by Meyers in the Petition. (Id. at 32.)

The drafting of HCQIA's immunity provisions unquestionably involved a balancing act between protecting physicians improperly subject to disciplinary action and Congress' concern over the chilling effect of civil lawsuits on peer review; however, Congress's choice to draft broad immunity provisions plainly evidences the fact that encouraging peer review was ultimately a more

compelling concern to the drafters.[18] Even if the articles submitted by Meyers are correct and sweeping change in the medical profession and reduction of medical errors were not effectuated by passage of HCQIA, the courts still must apply the federal statute and its immunity provisions as written by Congress and leave reformation of the

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[18] The hearings before the House Subcommittee on Civil and Constitutional Rights, cited on page 30 of the Petition, indicate that "Unless peer review can be encouraged, we simply will not be able to provide . . . protection [from incompetent and unprofessional physicians]. It is for the benefit of millions of patients at risk from these physicians-and not for any doctor or group of doctors-that we seek a limited, but essential immunity." *Health Care Quality Improvement Act of 1986: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. (Oct. 8 and 9, 1986). Such "essential immunity" provided in § 11111(a)(1), although quite broad, is limited in that it only applies in circumstances where due process and fairness requirements are met by the reviewing board, and it cannot bar specified civil rights claims. As discussed in more detail in Section IA and B, notably absent from § 11111(a) is any reference regarding falsity of information.

statute to Congress.[19] Meyers may be frustrated with Congress' broad grant of immunity under HCQIA and may feel aggrieved by the professional review process, but he has failed to establish any

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[19] Although it is unclear why Meyers cites to Abraham Lincoln's June 16, 1858 speech in support of his claim that the instant question is important, in such speech Lincoln expressly recognizes the distinction between the roles of Congress and the Supreme Court of the United States, explaining that after Dred Scott was argued before the Court, but prior to the Court's decision, "Senator Trumbull, on the floor of the Senate, requests the leading advocate of the Nebraska bill to state *his opinion* whether the people of a territory can constitutionally exclude slavery from their limits; and the latter answers: 'That is a question for the Supreme Court.'" See Abraham Lincoln, Springfield, Il, June 16, 1858. Just as it is this Court's province to reach the constitutionality of a bill, it is Congress' role to rewrite statutes if they fail to achieve their goals. To the extent that Meyers is correct and HCQIA has failed to achieve its goals, then it is left to Congress to revise the statute as needed.

compelling reasons for granting his Petition.[20] His Petition must be denied because Meyers is asking the Court to step in and recast an immunity provision about which no federal or state courts disagree as to the proper interpretation.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, the Supreme Court of the United States should deny the Petition for Writ of Certiorari filed by Meyers. First, Partridge was properly awarded summary judgment based on the immunity provided to him under § 11111(a)(1) of HCQIA. Second, Partridge was properly awarded attorneys' fees and costs as permitted by § 11113 of

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[20] In Meyer v. Sunrise Hospital, 22 P.3d 1142, 117 Nev. 313 (2001), a case cited by Meyers in his Petition, the Supreme Court of Nevada found that a hospital was protected by the broad immunity provision in HCQIA. In a concurring opinion, Justice Shearing acknowledged that sometimes HCQIA can be used "not to improve the quality of medical care, but to leave a doctor who is unfairly treated without any viable remedy" but still agreed that the hospital was immune. 22 P.3d at 1153-54, 117 Nev. at 330. In this case, Meyers likewise believes he has been aggrieved by the professional review process and is frustrated with Congress' broad grant of immunity. Even if Meyers' frustrations were warranted, Meyers still has not established an "important" federal question which would permit this Court to recast or rewrite the broad grant of immunity in HCQIA for those involved in the professional review process.

HCQIA. Third, Meyers has not set forth any compelling reasons for granting his Petition for Writ of Certiorari.

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